

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue date: 22May2002**

Case No. 2001-INA-47  
P1999-CT-01277615

In the Matter of:

**MAUREEN HANLEY-LYNCH,**  
Employer,

on behalf of

**VANIA NETO,**  
Alien,

Certifying Officer      Raimundo A. Lopez  
                                 Boston, Massachusetts

Appearance:            Judith B. Sporn, Esq.  
                                 for Employer and Alien

Before:                  Vitttone, Burke, and Neal

Mollie W. Neal  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises from an application for labor certification on behalf of Vania Lucia Neto ("Alien") filed by Maureen Hanley-Lynch ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A), as amended ("the Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26.

Under Section 212(a)(5)(A) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United

States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s request for review, as contained in the Appeal File (“AF”), and any written argument of the parties. §656.27(c).

### **STATEMENT OF THE CASE**

On November 10, 1997, Employer, Maureen Hanley-Lynch, filed an application for alien employment certification on behalf of the Alien, Vania Lucia Neto, to fill the position of Domestic Cook, “Live-In or Live-Out”. The job duties were described as planning and cooking meals in the Employer’s home; serving meals to employers and guests, and at dinner parties in the home; and cleaning kitchen, cooking utensils, and dining area after meals. The total hours of employment were listed as 40 hours per week, from 7:00 a.m. to 7:00 p.m. (with hours varying according to employer convenience due to work schedules and entertaining). The minimum requirements for the job were listed as two years of experience in the job offered. (AF - 51)

During the recruitment period, Employer advertised in the Connecticut Post and received three applicant referrals from the state job service. All three applicants were rejected by the Employer (AF 28-33).

On June 11, 1999, the CO denied the application pursuant to 20 C.F.R. §656.20(c)(8), finding that the job opportunity was not a *bona fide* job opportunity open to any U.S. worker. (AF 23-25). The Notice of Finding (NOF) indicated that there existed insufficient information to determine whether the position of domestic cook actually existed in the Employer’s household or whether the job had been created solely for the purpose of qualifying the alien as a *skilled worker* under current immigration law. (AF 24)<sup>1</sup>

The NOF specified that rebuttal documentation must clearly substantiate that the position of household Domestic Cook is a *bona fide* job opportunity and not a position created solely for the purpose of qualifying the alien as a *skilled worker*.<sup>2</sup> Employer was instructed to include in its rebuttal responses to

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<sup>1</sup> The CO noted that under immigration law, the number of immigrant visas available to *unskilled workers* (aliens granted labor certifications in occupations requiring less than two years experience) is very limited because of the lengthy waiting period for unskilled worker visas. On the other hand, there is no waiting period for most immigrant visas in the *skilled worker* category (occupations requiring at least two years of experience). Thus, for all practical purposes, immigration visas for unskilled workers are unavailable.

<sup>2</sup> The CO also cited the Dictionary of Occupational Titles (DOT), noting that the DOT classifies almost all household positions as unskilled because the occupations require less than two years of

twelve questions, relating to, but not limited to: the number of meals prepared daily and weekly and the length of time required to prepare such meals; the number of people for whom such meals were to be prepared; how frequently Employer entertains and the number of guests and the number of meals served. In addition, relevant documentation, relating to catering bills, grocery store receipts, business related entertaining expenses, or tax documentation, and schedules for all persons residing in the household, was requested. Employer was also asked to address questions relating to the care of pre-school or school-aged children residing in the household, and whether the Alien would be required to perform functions such as child care, general cleaning or other non-cooking functions. (AF-24-25)

In rebuttal, the Employer stated that: the prospective employee would prepare approximately two meals daily and fourteen meals weekly; preparation time would be approximately two hours per meal; and the number of persons for whom meals prepared for entertainment would range from a minimum of two to a maximum of twelve. Employer indicated that the work schedule of Phil Lynch is 6:30 a.m. when he leaves the house to 7:30 p.m. when he returns home, Monday through Friday. Employer, Maureen Lynch does not work. Phillip Lynch Jr. attends school from 9:00 a.m. to 12 noon Monday, Tuesday, and Thursday. Employer responded that she entertains weekend guests two times a month and dinner guests approximately three times a month. Entertainment records were not available for 1998, but Employer did provide information for 1999 which disclosed that during an eight month period she entertained on approximately 35 days, 130 persons, and served 93 meals. (AF 4-6)

Employer further responded that "If available the alien will be asked to do house cleaning and some child care. Employer indicated that she currently performs most of the other tasks with the aid of a baby sitter/house cleaner" who is employed twelve (12) hours a week. (AF 6)

A final determination denying labor certification was issued on September 24, 1999, pursuant to 20 C.F.R. §656.20(c)(8), based on a finding that a *bona fide* job opening did not exist, as it appeared that the position described in the application is open only to the alien.

Employer requested administrative judicial review on October 26, 1999.

## DISCUSSION

Congress enacted Section 212(a)(14) of the Immigration and Nationality Act of 1952 (as amended by Section 212(a)(5) of the Immigration Act of 1990 and recodified at 8 U.S.C. Section 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." *Cheung v. District Director, INS*, 641 F2d. 666, 669 (9th Cir., 1981); *Wang v. INS*, 602 F2d. 211,213 (9th Cir. 1979).<sup>3</sup>

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education, training, and/or experience to gain proficiency. However, Domestic Cook is an exception, which can require as many as two years of training or experience for proficiency, and thus is considered a *skilled worker*. (AF 24)

<sup>3</sup> The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No.748, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 3333-3334. See also 20

To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Consequently, the burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsh Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. 656.2(b). Moreover, as was noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Id.* at 8.

Section 656.20(c)(8) of the labor certification regulations requires that the job opportunity be clearly open to any qualified U.S. worker. This regulation means that the job opportunity must be *bona fide*, and the job opening as described on Form ETA 750, actually exists and is open to U.S. workers. *Carlos Uy III*, 1997-INA-304 (BLACA Mar. 3 1999)(*en banc*). *Bulk Farms v. Martin*, 963 F. 2d 1286 (9<sup>th</sup> Cir. 1992).

Employer was instructed in the NOF that "[r]ebuttal documentation must clearly substantiate that the position of Domestic Cook in your household is in fact, a *bona fide* job opportunity, and not a position that was created solely for the purpose of qualifying the alien as a skilled worker."

In denying labor certification, the CO concluded that the details provided did not establish that there was a *bona fide* position for a Domestic Cook. We concur. In *Carlos Uy III*, the Board set forth a "totality of circumstances" test to be used in order to determine the *bona fides* of a job opportunity in domestic cook applications. Specifically, the Board stated:

The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the totality of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to misdescribe a position; what reasons are present for believing or doubting the employer's veracity for the accuracy of the employer's assertions; and whether the employer's statements are supported by independent verification.

The Board in *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*) held that "written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation." The Board went on, however, to state "[t]his is not to say that a CO must accept such assertions as credible or true: but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve." The Board in *Uy* held that "a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof." *Uy* at 9, citing *A.V. Restaurant*, 1988-INA-330 (Nov. 22, 1988); *Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989).

In the instant case, we find Employer's rebuttal documentation insufficient to establish that there is a *bona fide* position for a Domestic Cook in Employer's household. The job as advertised was a forty hour week job. Employer indicated that, for an eight month period, she entertained 35 days, and that 93 meals were prepared and served. She stated that the domestic cook would be required to shop for, prepare, and

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C.F.R. §656.2(b).

cook the meals for entertainment, as well as cook two meals a day. Additionally, if available, the Alien would be required to perform housecleaning chores and child care duties. Based on Employer's rebuttal, and the totality of the circumstances, insufficient evidence has been provided to explain what the cook does during all of the work day. While there appears to be a need for some meal preparation, the job duties to be performed by the cook do not appear to require a forty hour week ( or for that matter a 30 hour week). In view of the Employer's indication that housekeeping and child care duties would also be required, when the Alien was available it appears that the job falls into the unskilled job category of general houseworker, whose duties include cooking. As such, we find that the labor certification application mischaracterizes the position offered, and concur with the CO that the job opening was not open to U.S. workers. The job offered appears to fall more within the DOT definition of House Worker Domestic rather than Domestic Cook. *See Carlos Uy III*, 1997-INA-304 (Mar.3 1999)(en banc), n. 4; DOT 301.474.010 House Worker, General (domestic ser.) Alternate titles: housekeeper, home; and DOT 305.281-010 Cook (domestic ser.) .

Employer has failed to prove that the position offered was a *bona fide* job opportunity.

We find the CO acted properly in denying labor certification under 656.20(c)(8).

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

**SO ORDERED.**

A  
MOLLIE W. NEAL  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.